Kluwer Arbitration Blog

A Guide to the IBA's Revised Guidelines on Conflicts of Interest

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The IBA recently revised its Guidelines on Conflicts of Interest in International Arbitration. This was the culmination of a review by the IBA Arbitration Committee, which began in 2012. The salient changes address the rise of advance declarations by arbitrators; third-party funding; increasing significance of arbitral secretaries; and the possibility that an arbitrator, and counsel to one of the parties, operate from the same chambers. The Guidelines are widely consulted when arbitrators evaluate whether they can accept appointments, or if they first need to make disclosures to the parties about potential conflicts. This article outlines the key changes in the revised Guidelines.

Structure of the Guidelines

The revised Guidelines retain the previous structure comprising Part I: General Standards and Part II: Application Lists. The General Standards contain seven sets of principles to which arbitrators should adhere in order to ensure that they are not subject to a material conflict of interest. The Application Lists give practical examples of when an arbitrator cannot act at all (the Non-Waivable Red List); when the arbitrator can only act if he or she first makes disclosures and the parties expressly agree to the appointment (the Waivable Red List); when the arbitrator has a duty to disclose but can nonetheless act unless the parties make a timely objection (the Orange List); and when disclosure is not necessary (the Green List).

Key changes to the General Standards

Advance declarations by arbitrators: The new General Standard 3(b), which is the most prominent addition to the revised Guidelines, addresses the increasing use by prospective arbitrators of advance declarations or waivers in relation to possible future conflicts of interest. While the Guidelines state that the validity and effect of such advance declarations or waivers will depend on the case in question, the applicable law and the specific wording of the waiver, they make clear that they do not discharge the arbitrator from his or her ongoing duty of disclosure.

Arbitral Secretaries: The new General Standard 5(b) states that the Guidelines also apply to arbitral secretaries and assistants. This reflects the increasing use of arbitral secretaries and their significance over the last ten years since the Guidelines were first issued. The previous version's explanatory notes stated that the impartiality and independence of secretaries were the

responsibility of the arbitrator. The revised explanatory note now states that it is the responsibility of the Arbitral Tribunal to ensure that this duty of independence and impartiality is respected by arbitral secretaries. Further, the duty is to be respected at all stages of the arbitration, and applies irrespective of whether or not the particular arbitration institution requires arbitral secretaries to sign declarations of independence and impartiality.

The same standard for arbitral secretaries already appears in the Young ICCA's Guide on Arbitral Secretaries in the following words: *"The arbitral tribunal shall confirm to the parties that the proposed candidate for arbitral secretary is independent, impartial and free of any conflicts of interest."* Perhaps the best illustration of the growing importance of arbitral secretaries is that the Young ICCA's Guide acknowledges that the role of arbitral secretaries may go beyond purely administrative matters to drafting procedural orders and appropriate parts of the award.

Arbitrator's law firm: The revised Guidelines make clear that *"the arbitrator is in principle considered to bear the identity of his or her law firm"* (General Standard 6(a)). The explanatory note says that a balance has to be struck between a party's desire to appoint an arbitrator who may be a partner in a large international law firm and the importance of maintaining confidence in the independence and impartiality of arbitrators. Any potential conflicts that an arbitrator might have should be examined on a case-by-case basis. In determining any potential conflicts, consideration should be given to the involvement that a firm has with a party beyond representation in a legal matter. Perhaps surprisingly, the 2014 Guidelines state that barristers' chambers may not be equated with law firms and no general standard is given for barristers' chambers.

Third-party funders: The previous Guidelines provided that managers, directors or persons having a controlling interest of a legal entity that is a party to an arbitration shall be considered to be the equivalent of that same legal entity. The 2014 Guidelines extend this list to include third-party funders and insurers who have a *"…direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration"* (General Standard 6(b)). This means that third-party funders and insurers may now be considered to bear the identity of the party that they are funding.

The revised General Standard 7(a) also provides that parties must now disclose any direct or indirect relationship between the arbitrator and a third-party funder. The explanatory note confirms that the parties' duty of disclosure has been extended to include third-party funders. This General Standard now says that the relevant party must make the notifications *"at the earliest opportunity,"* whereas before the duty applied *"before the beginning of the proceeding or as soon as [the party] becomes aware of such relationship."*

Identity of counsel: General Standard 7(b) is new and provides that each party is obliged to state the identity of its counsel as well as any relationship, if such exists, between its counsel and the arbitrator by virtue of being members of the same barristers' chambers. This should be done at the earliest opportunity and upon any change in its counsel team.

Practical Application of the General Standards

Non-Waivable Red List: It is now explicitly stated that in situations covered by the Non-Waivable Red List, arbitrators should not act even when there is no timely objection by the parties. The list now clarifies that the arbitrator cannot be an employee of a party, have a controlling interest in a third-party funder or have his or her firm regularly advise a party.

Waivable Red List: The definition of an arbitrator's *"close family member"* who has a significant financial interest in the outcome of the dispute has been widened to include not only a spouse, sibling, child, parent or life partner but also *"any other family member with whom a close relationship exists."* Regular advice by the arbitrator to any party or affiliate which is not a significant source of income for the arbitrator or his firm is now flagged. Previously, only regular advice to the appointing party or its affiliate was flagged. Where an arbitrator derives significant financial income from advising a party regularly, this is dealt with in the *non-waivable red list.*

Orange List: The Guidelines now state that the Orange List is a non-exhaustive enumeration of specific circumstances that *"may give rise to doubts"* about the arbitrator's impartiality or independence. The updated notes state that while situations falling outside of the Orange List or the time limits therein will usually not be subject to disclosure, they should be assessed on a case-by-case basis. In addition, examples are given of situations that are not in the Orange List but may require disclosure, depending on the circumstances: repeat past appointments by the same party or the same counsel beyond the normal three-year period; an arbitrator concurrently acting as counsel in an unrelated case that involves similar legal issues; and an appointment made by the same party or the same counsel while the case is ongoing.

New entries in the Orange List include instances where enmity exists between on the one hand, an arbitrator and, on the other hand, counsel, a senior representative of a party, or a third-party funder. There is also a new entry in the event where the arbitrator, within the past three years, has acted as co-counsel with another arbitrator or counsel for one of the parties. The arbitrator publicly advocating a position on the case is now flagged – it no longer need be a specific position to be relevant.

Green List: The entry concerning when the arbitrator's law firm has acted without the involvement of the arbitrator against a party or affiliate on an unrelated matter has been deleted. There is a new entry in the event where the arbitrator either teaches in the same faculty as another arbitrator or counsel to one of the parties, or serves as an officer of an entity with another arbitrator or counsel for one of the parties. Similarly, a new entry includes circumstances where the arbitrator was involved in a conference, seminar or working party with another arbitrator or counsel to one of the parties. Finally, there is a new entry in the event where the arbitrator has a relationship with a party or affiliate through a social media network, which has become increasingly common through websites such as LinkedIn.

Conclusion

The revised Guidelines mark an evolution rather than a sea change from when they were first issued in 2004. They maintain a framework that is pro-disclosure rather than pro-disqualification. While retaining their existing structure, they have been adapted to include recent developments and norms. When the Guidelines were originally issued, it was always envisaged that, following their adoption and use, they would later be supplemented, revised and refined. Following the most recent revisions, it will be interesting to see how they evolve further in the next decade.

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